Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LARRY D. JOHNSTON, LAWRENCE G. LYON and H. RODGERS COMPANY, a Colorado general partnership,

Petitioners,

v.

CIGNA CORPORATION, a Delaware corporation, CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, a Delaware corporation, CIGNA SECURITIES, INC., a Delaware corporation, CIGNA FINANCIAL PARTNERS, INC., a Delaware corporation, CIGNA HOLDINGS, INC., a Delaware corporation, and M. DOAK JACOWAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, is a lawful and constitutional exercise of congressional legislative power to enact a statute of limitations governing claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

LIST OF PARTIES

The following parties were plaintiffs below and are petitioners[1] before this Court:

Larry D. Johnston

Lawrence G. Lyon

H. Rodgers Company, a Colorado general partnership

The following parties were defendants below and are respondents before this Court:

CIGNA Corporation

CIGNA Individual Financial Services Company

CIGNA Securities, Inc.

CIGNA Financial Partners, Inc.

CIGNA Holdings, Inc.

M. Doak Jacoway

Pursuant to Supreme Court Rule 29.4(b), petitioners state that the constitutionality of an Act of Congress was drawn into question in the United States Court of Appeals for the Tenth Circuit. The United States intervened in the action, filed a brief in the Tenth Circuit, and appeared at oral argument.

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[1] Supreme Court Rule 29.1 requires that petitioners identify all parents or subsidiary corporations of each corporation on whose behalf the filing is made. Petitioner H. Rodgers Company is a Colorado general partnership, and has no parent or subsidiary corporations.

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H. RODGERS COMPANY, a Colorado general partnership,

Petitioners,

v.

CIGNA CORPORATION, a Delaware corporation,
CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY,
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a Delaware corporation, CIGNA FINANCIAL PARTNERS, INC.,
a Delaware corporation, CIGNA HOLDINGS, INC., a Delaware
corporation, and M. DOAK JACOWAY,

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit, filed December 7, 1993. Rehearing was denied February 1, 1994.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported below at 14 F.3d 486 and is reprinted in the Appendix ("App.") accompanying this petition at pages A-1 to A-32. Petitioners' Petition for Rehearing was denied by an order entered on February 1, 1994, reprinted at App. B-1 to B-2. The opinion of the United States District Court for the District

of Colorado (Babcock, D.J.) denying petitioners' motion for reinstatement, petitioners' motion from relief from judgment and petitioners' motion for reconsideration is reported at 789 F. Supp. 1098 and is reprinted at App. C-1 to C-11. The opinion of the United States District Court for the District of Colorado denying respondents' original motion to dismiss on statute of limitations grounds is reported at 755 F. Supp. 339, and is reprinted at App. D-1 to D-10.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, section 1, of the United States Constitution states, in pertinent part:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, section 1, of the United States Constitution states, in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private

property be taken for public use, without just compensation.

Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991) codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991) ("Section 27A"), provides:

> (a) Effect on pending causes of action.
>
> The limitation period of any private civil action implied under Section [10(b)] of this [Act] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on dismissed causes of action.
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time-barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

STATEMENT OF THE CASE

Factual Background

Petitioners Larry D. Johnston ("Johnston") and Lawrence G. Lyon ("Lyon") are the general partners of petitioner

H. Rodgers Company, a Colorado general partnership ("Rodgers"). Johnston and Lyon purchased four separate real estate limited partnerships created by, recommended and sold by the respondent CIGNA companies ("CIGNA"). The sale of the limited partnerships to Johnston and Lyon was made by respondent Jacoway, an employee of CIGNA, who had developed a close business relationship with Johnston and Lyon. Jacoway and CIGNA had prepared financial plans for Johnston and Lyon which stated their financial objectives—financial security for their families and for retirement, and a relatively conservative 8% return on their invested assets. In their capacities as financial planners, Jacoway and CIGNA sold Johnston and Lyon interests in the four real estate limited partnerships under the guise that the limited partnerships were appropriate investments for Johnston and Lyon and were consistent with the investment plans prepared for them by Jacoway and CIGNA.

In making the sales to Johnston and Lyon, Jacoway told them that CIGNA would "stand behind" the investments. Similar representations were made to Johnston's and Lyon's accountant by Jacoway and a CIGNA executive in Connecticut.

All four investments subsequently suffered losses—one filed for bankruptcy, a foreclosure was commenced on another, and the remaining two suffered substantial losses. In August, 1989, the president of CIGNA Securities, Inc. told Johnston and Lyon that CIGNA would not stand behind the investments. This conversation alerted Johnston and Lyon that the risk inherent in the limited partnership investments was far greater than would be consistent with the financial goals set forth in the financial plans prepared for them by CIGNA.

Initial Proceedings

Petitioners, plaintiffs below, filed suit against respondents in the United States District Court for the District of Colorado on January 30, 1990, alleging, among other claims, that respondents had committed fraudulent acts under Section 10(b) of the

Securities Exchange Act of 1934 (the "1934 Act") and Rule 10b-5 promulgated thereunder. On January 9, 1991, the United States District Court for the District of Colorado determined that the statute of limitations applicable to petitioners was a three-year period which began to run when the fraud was, or should have been, discovered, and specifically held that, applying that limitations period, petitioners' suit was timely filed. 755 F. Supp. at 339, 341-343.

This action was still pending on June 20, 1991, when this Court issued its decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Respondents filed a motion to dismiss based upon the limitations period established in *Lampf* and applied retroactively in accordance with *Beam*. Respondents' motion was granted by the District Court on October 10, 1991. Judgment was entered against petitioners and for respondents on the same day. At the time judgment was entered, petitioners had no good faith grounds on which to file an appeal; consequently, no appeal was filed.

Slightly over one month later, on November 27, 1991, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2387 (1991), which, in Section 476, added Section 27A to the 1934 Act. Section 27A created a new limitations period for actions brought under § 10(b) of the 1934 Act that had been filed prior to June 19, 1991. Upon the filing of a timely motion, Section 27A(b) permitted reinstatement of securities fraud actions that would fall within Section 27A(a) but had been dismissed between June 19, 1991, and November 27, 1991, as a result of the combined effect of the *Lampf* and *Beam* decisions.

Petitioners filed a motion to reinstate their claims under Section 27A(b) on January 10, 1991, and moved for relief from judgment under Fed. R. Civ. P. 60(b)(6) on March 10, 1991. In a Memorandum Opinion and Order dated March 20, 1992, the District Court denied both motions on the grounds that Section 27A(b) was unconstitutional. The case was appealed to the

United States Court of Appeals for the Tenth Circuit, which, on December 7, 1993, upheld the District Court's ruling. The Tenth Circuit held that Section 27A(b) as applied to final, nonappealable judgments, is unconstitutional as violative of the vested rights doctrine and the principle of separation of powers. 14 F.3d at 497. Circuit Judge Holloway dissented on the grounds that because the remedial measures undertaken by Congress in Section 27A were "freighted with the public interest, and do not merely deal with private rights," the vested rights doctrine provides insufficient reason to invalidate the statute; and secondly, that the separation of powers doctrine was not violated where Congress exercised its Article I legislative powers by allowing a day in court on claims barred solely by reason of the *Lampf* decision. 14 F.3d at 500-501. Rehearing was denied on February 1, 1994.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE FEDERAL COURTS AND AMONG THE CIRCUITS REGARDING THE CONSTITUTIONALITY OF SECTION 27A(b)

The Tenth Circuit's decision, while aligned with that rendered by the Sixth Circuit in *Plaut v. Spendthrift Farm*, 1 F.3d 1487 (6th Cir. 1993), is directly contrary to the decision rendered by the Fifth Circuit, which found Section 27A(b) to be a constitutional exercise of Congress' legislative powers. *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993). Decisions by various District Courts are in similar conflict. Petitions for certiorari have been filed in both *Plaut* and *Pacific Mutual*, and this Court has granted the petition in *Pacific Mutual*. Thus, the Court has already recognized that the Constitutional issues purportedly raised by the enactment of Section 27A(b), and its application to judgments which became final during the brief period between June 20, 1991, and November 27, 1991, are of sufficient import to warrant final adjudication by the Supreme Court.

II. THE TENTH CIRCUIT MISAPPLIED PRIOR DECISIONS OF THE SUPREME COURT

A. THE TENTH CIRCUIT DID NOT PROPERLY CONSIDER THE LIMITED APPLICABILITY OF THIS COURT'S PRIOR "VESTED RIGHTS" DECISIONS.

The Tenth Circuit's "vested rights" determination rests primarily on this Court's holding in *McCullough v. Virginia*, 172 U.S. 102 (1898). 14 F.3d at 491-92. *McCullough* held that it was "not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough*, 172 U.S. at 123. However, as Judge Holloway noted in his dissent below, *McCullough* was born out of a contract rights dispute which had resulted in an established money judgment. 14 F.3d at 498. *McCullough's* vested rights language thus reflects the Court's concern that there be due process protection of judicially determined contract rights, and the *McCullough* holding should be limited to that narrow application.

Here, on the other hand, there is no judicial determination of contract rights. Instead, the judgment at issue is based solely upon the application of a procedural rule governing time limitations on the availability of a remedy. Such procedural rules do not create property of the sort afforded due process protection. *Chase Secur. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitation come into law through legislation and "[t]heir shelter has never been regarded as what now is called a 'fundamental' right").

Nor does the fact that a judgment had entered and become final reduce Congress' power to abrogate the judgment through legislation regulating this purely procedural area. *See e.g., Fleming v. Rhodes*, 331 U.S. 100 (1947) (subsequent legislation effectively reversed state court judgments for eviction); *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958) (reaffirming holding in *Fleming* that rights in the state court judgments were "acquired subject to the possibility of their

dilution through Congress' exercise of its paramount regulatory power).

Petitioners also adopt by reference the arguments made in the Petition for Certiorari filed in *Plaut* (the "*Plaut* Petition") at 9-11, and in the Brief of Respondents in Opposition to Petition for a Writ of Certiorari filed in *Pacific Mutual* (the "*Pacific Mutual* Response") at 6-9.

A writ of certiorari should issue to resolve the issue of the scope of the "vested rights" doctrine expressed in *McCullough* as it applies to judgments entered purely as a result of the application of procedural rules.

B. THE TENTH CIRCUIT INCORRECTLY DETERMINED THAT SECTION 27A(b) VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The Tenth Circuit held that Section 27A(b) violates the separation of powers doctrine because Congress cannot legitimately exercise its legislative power to affect cases in which judgments are final and nonappealable. 14 F.3d at 496. The Tenth Circuit held that to do so was to violate a principle of law established in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). That principle has been articulated as follows:

> The federal judiciary will not have its decision in a case frustrated by having it subject to revision, suspension, modification, or other review by the executive or legislative branches.

14 F.3d at 495, *quoting* J. Nowak, R. Rotunda, J. Young, *Constitutional Law* 67 (3d ed. 1986). The Tenth Circuit apparently equated a judgment based on statute of limitations grounds with a "decision" of the court. 14 F.3d at 498 ("*Hayburn's Case* enunciated the separation of powers principle that Congress cannot, consistent with the Constitution, upset final judgments of federal courts").

However, this Court has determined that legislation mandating merit review is constitutional. For example, in *Paramino Lumber Co. v. Marshall*, the Court upheld the constitutionality of a Congressional Act directing a new review of a case and entry of a new order. No Constitutional violation was found, because the Act did not direct the entry of a specific award. *Paramino Lumber*, 309 U.S. 370, 377-78 (1940); 14 F.3d at 499. This Court specifically sustained the constitutionality of the statute in *Paramino Lumber* in the face of a separation of powers challenge: "Nor can we say that this legislation is an excursion of the Congress into the judicial function." 309 U.S. at 381.

The holding in *Paramino Lumber* is especially applicable to Section 27A(b) because statutes of limitation fall particularly within Congress' legislative power. Even the Tenth Circuit stated that in enacting Section 27A, "Congress exercised a key legislative power. Statutes of limitations traditionally reside in the legislative branch." *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1546, (10th Cir. 1992), *cert. denied sub nom. Dennler v. Trippet*, ____ U.S. ____, 113 S. Ct. 1841, 123 L.Ed.2d 467 and *cert. denied sub nom. Thorner v. Cross*, ____ U.S. ____, 113 S. Ct. 1842 (1993). Thus, Congress stayed well within the legitimate scope of its legislative powers when it enacted Section 27A(b) and directed that cases falling within its purview receive merit review by the judicial branch. *See also, Anixter*, 977 F.2d at 1547 (statutes of limitation in the "peculiar realm of legislative prerogative;" no vested right in a judgment that Congress cannot annul). Legislating the opportunity for merit review is a far cry from directing the entry of a specific award, which would be a clear violation of the separation of powers doctrine. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); 14 F.3d at 489.

Petitioners also adopt by reference the arguments made in the *Plaut* Petition at 9-11 and in the *Pacific Mutual* Response at 9-10.

The Court should issue a writ of certiorari to determine whether or not the separation of powers doctrine is violated by legislation such as Section 27A(b), which opens the door for

merit review by the courts, but in no way directs the outcome of that review.

III. THE TENTH CIRCUIT STRUCK DOWN AN ACT OF CONGRESS PERTAINING TO AN OFTEN-UTILIZED FEDERAL STATUTE AS UNCONSTITUTIONAL, THUS CREATING AN ISSUE PARTICULARLY SUITED FOR SUPREME COURT REVIEW

Section 27A was enacted by Congress in an attempt to remedy a perceived injustice worked by *Lampf* and *Beam* on plaintiffs who had relied on longstanding limitations periods applied by the various federal courts to Section 10(b) actions. The statute was intended to affect cases nationwide that had been brought under the most commonly-utilized antifraud provision in the federal securities laws. Section 27A(b) was specifically intended to remedy the problem confronted in the instant case: instances in which judgment had entered against plaintiffs in the short period between June 20, 1991, when the *Lampf* and *Beam* decisions came down, and November 27, 1991, when Congress enacted Section 27A.

The various Circuit courts' decisions striking down Section 27A(b) as unconstitutional as applied to final, nonappealable judgments are particularly suited for Supreme Court review because they implicate the relative authorities of the Congress and the judiciary. Only the Supreme Court can delineate clearly the boundaries of those authorities. This greater policy reason also supports issuing a writ of certiorari.

Petitioners also adopt by reference the arguments made in the *Plaut* Petition at 9.

CONCLUSION

A writ of certiorari should be issued to address the issues of Constitutional law discussed above.

Dated: Denver, Colorado
May 2, 1994

Respectfully Submitted,

/s/ ALAN C. FRIEDBERG

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Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 92-1186

LARRY D. JOHNSTON; LAWRENCE G. LYON; H. RODGERS COMPANY,

Plaintiffs-Appellants,

vs.

CIGNA CORPORATION, INC; CIGNA SECURITIES; CIGNA HOLDINGS, INC.; M. DOAK JACOWAY; CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY; CIGNA FINANCIAL PARTNERS, INC., A DELAWARE CORPORATION,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor,

SECURITIES AND EXCHANGE COMMISSION,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 90-B-177)

Alan C. Friedberg, Martha C. Reps of Pendleton & Sabian, P.C., Denver, Colorado for Plaintiffs-Appellants.

Theodore J. Boutrous, Jr. of Gibson, Dunn & Crutcher, Washington, D.C. (Theodore B. Olson, Stephen R. McAllister, John K. Bush of Gibson, Dunn & Crutcher, Washington, D.C.,

David G. Palmer, Thomas M. Piccone of Gibson, Dunn & Crutcher, Denver, Colorado with him on the brief) for Defendants-Appellees.

Mark B. Stern, Attorney, Civil Division, Department of Justice, Washington, D.C. (Michael J. Norton, United States Attorney, Denver, Colorado, Stuart E. Schiffer, Acting Assistant Attorney General, Stuart M. Gerson, Assistant Attorney General, Barbara C. Biddle, Attorney, Civil Division, Department of Justice, Washington, D.C. with him on the brief) for Intervenor.

Paul Gonson, Solicitor, Jacob H. Stillman, Associate General Counsel, Leslie E. Smith, Senior Special Counsel, Securities and Exchange Commission, Washington, D.C. for Amicus Curiae.

Before BALDOCK, HOLLOWAY, and KELLY, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiffs appeal the district court's denial of their motion for reconsideration of their motion for reinstatement of claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and their alternative motion for relief from judgment, Fed. R. Civ. P. 60(b)(6). The district court denied Plaintiffs' motion for reconsideration, reaffirming its earlier determination that Defendants were entitled to summary judgment because Section 27A of the Securities Exchange Act of 1934, § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 15 U.S.C. § 78aa-1, is unconstitutional.[1] We have jurisdiction under 28 U.S.C. § 1291.

---

[1] Because the constitutionality of section 27A is at issue, the United States intervened as a matter of right, 28 U.S.C. § 2403(a).

Plaintiffs filed suit on January 30, 1990 alleging that Defendants violated Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, 17 C.F.R. § 240.10b-5, and various Colorado securities laws in connection with Plaintiffs' purchases of certain interests in real estate limited partnerships in 1983 and 1987. Plaintiffs also asserted state law claims for breach of fiduciary duty and negligence. On January 9, 1991, the district court granted Defendants' motion to dismiss Plaintiffs' state law claims. Borrowing the applicable limitations period from Colorado law, however, the court denied Defendants' motion to dismiss Plaintiffs' Section 10(b) claims as time barred.

On June 20, 1991, the Supreme Court announced its decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439 (1991). In *Lampf,* the Court rejected the practice of borrowing state statutes of limitation for private causes of action under Section 10(b). 111 S. Ct. at 2781-82. The Court held that such actions must be commenced within one year after discovery of the facts constituting the violation and within three years after the violation occurred. *Id.* The *Lampf* Court applied this new rule retroactively to the parties before it and dismissed the plaintiffs' action as time barred. *Id.* On the same day, the Court decided *Beam,* in which the majority held that when it applies a new rule to the litigants in a particular case, that rule must also be applied to all other pending civil suits. 111 S. Ct. at 2441.

Relying on *Lampf* and *Beam,* Defendants moved for summary judgment on September 6, 1991, on the ground that Plaintiffs' Section 10(b) claims were time barred. The district court agreed that Plaintiffs' action was not timely under the rule of *Lampf* and granted Defendants' motion on October 10, 1991. Plaintiffs did not appeal this determination.

Approximately two months after judgment was entered against Plaintiffs, and after Plaintiffs' time in which to file a notice of appeal had expired, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991,

Pub. L. No. 102-242, 105 Stat. 2387 (codified at 15 U.S.C. § 78aa-1), amending the Securities Exchange Act of 1934 by adding the following new Section 27A:

> (a) Effect on pending causes of action
>
> The limitation period for any private civil action implied under section [10(b)] of this [Act] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on dismissed causes of action
>
> Any private civil action implied under section [10(b)]of this [Act] that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

15 U.S.C. § 78aa-1. Section 27A effectively overturned the *Lampf/Beam* basis upon which the district court had granted Defendants' summary judgment motion.

On January 10, 1992, Plaintiffs filed a timely motion to reinstate their section 10(b) claims pursuant to section 27A(b). Defendants opposed the motion, contending that section 27A was unconstitutional. On March 10, 1991, while the motion for reinstatement was still pending, Plaintiffs filed a Rule 60(b) motion requesting relief from the October 10, 1991 judgment. In that motion, Plaintiffs requested that if the district court determined that Section 27A could not revive their final, unappealed

judgment, the court should nevertheless grant Rule 60(b) relief "to allow justice to be done and the clear intent of Congress to be vindicated."

In a Memorandum Opinion and Order dated March 20, 1992, the court denied both motions. The court denied Plaintiffs' motion to reinstate, concluding that section 27A violates the principle of separation of powers and impermissibly upsets a final judgment. The court also rejected Plaintiffs' Rule 60(b) argument as dependent on the validity of section 27A.

On April 3, 1992, Plaintiffs filed a Rule 59(e) motion for reconsideration of the denial of their motion to reinstate and their Rule 60(b) motion in light of the Supreme Court's decision in *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992).[2] On May 20, 1992, the court denied the motion. Plaintiffs thereafter filed a timely notice of appeal.

On appeal, Plaintiffs claim (1) the district court erred in denying their motion to reinstate because section 27A represents a constitutional exercise of congressional power, and (2) the district court abused its discretion in denying their Rule 60(b) motion for relief from judgment. Defendants maintain that despite our intervening decision in *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), section 27A(b) is unconstitutional as applied to the final, unappealed judgment in this case in that section 27A(b) violates the doctrine of vested rights and the principle of separation of powers. We review the district court's decision regarding the constitutionality of section

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[2] Plaintiffs relied on *Robertson* to support their contention that the district court erred in concluding that section 27A is unconstitutional. In *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *see infra* part I, we applied *Robertson* and concluded that section 27A is constitutional as to cases that were still before the courts at the time section 27A was enacted. However, neither *Robertson*, nor *Anixter*, addresses the issue of whether Congress can upset a judgment that is final in that the availability of appeal is exhausted, and the time for a petition for certiorari has elapsed, or the petition has been denied.

27A(b) de novo.[3] *See United States v. Wynne*, 993 F.2d 760, 764 (10th Cir. 1993).

I.

In *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533, 1542 (10th Cir. 1992), we held that section 27A did not violate the principle of separation of powers because "Congress properly exercised its legislative function to compel a change in the law." Applying *United States v. Klein*, 80 U.S. 128 (1871), and *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992), we concluded that section 27A was a constitutional exercise of congressional power because:

> Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. (citation omitted). It does not remove or alter the courts' constitutional adjudicatory function. Instead, in section 27A Congress prescribed a new statute of limitations for the judiciary to apply to all section 10(b) litigation pending on June 19, 1991.

Anixter, 977 F.2d at 1545 (emphasis added). All but one of our sister circuits that have addressed the issue have concluded that section 27A, as it applies to cases still before the courts, establishes a valid change in the law. *See Axel Johnson v. Arthur Anderson & Co.*, 1993 U.S. App. LEXIS 24954 (2d Cir. Sept. 27, 1993); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v.*

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[3] Defendants do not dispute that Plaintiffs section 10(b) claims arising out of the 1989 transactions meet the criteria of section 27A(b), and therefore would be restorable if section 27A(b) is constitutional. As a result, the constitutional issue is unavoidable. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (we do not decide constitutional issues unnecessarily). Given our conclusion with respect to the constitutionality of section 27A(b), we need not address Defendants' argument that Plaintiffs' section 10(b) claims arising out of the 1983 transactions fail to meet the requirements of section 27A(b).

Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993); *but see Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993) ("we strongly disagree with the rationale behind these decisions [upholding the constitutionality of section 27A as a valid change in the law]").

In Anixter, as distinct from the instant case, the plaintiffs' petition for certiorari was before the Supreme Court at the time section 27A was enacted.[4] *Id.* at 1542. As a result, we had no occasion in *Anixter* to address the constitutionality of section 27A(b) to the extent it directs courts to reinstate claims that were no longer before the courts. Section 27A(b) specifically addresses cases which have been dismissed as time barred and directs that these cases be reinstated. Section 27A(b) makes no distinction between a dismissed case in which an appeal or a petition for certiorari was before the courts at the time of enactment, and a dismissed case which had completed its journey through the courts at the time section 27A was enacted. Thus, section 27A(b) purports, in part, to reopen cases in which courts have rendered final and nonappealable[5] judgments prior to its enactment. Only two circuits to date have addressed this issue and they have reached opposite conclusions. *See Plaut*, 1 F.3d

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[4] For purposes of retroactive legislation, a case is final only after the availability of appeal is exhausted, and the time for a petition for certiorari has elapsed or the petition has been denied. See *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *Gray*, 989 F.2d at 1571; *Plaut*, 1 F.3d at 1500 (Keith, J., concurring in part and dissenting in part). Because the *Anixter* plaintiffs' petition for certiorari was before the Supreme Court at the time section 27A was enacted, the case had not completed its journey through the appellate process and was therefore not final. *See Gray*, 989 F.2d at 1571.

[5] For purposes of this opinion, we use the term "nonappealable" to refer to cases that have completed their journeys through the courts. *See supra* note 4.

1487 (6th Cir. 1993) (holding that section 27A(b) is unconstitutional); *Pacific Mut.*, 997 F.2d 39 (5th Cir. 1993) (holding that section 27A(b) does not offend the constitution). In *Pacific Mut.*, the Fifth Circuit concluded that Congress had the authority to upset final judgments because, "Congress and the judiciary share authority to decide when the judiciary's word on a controversy is its last." 997 F.2d at 55. The court further concluded that "judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation." *Id.* at 49.

In *Plaut*, the Sixth Circuit held that section 27A(b) was unconstitutional based on the principle of separation of powers and the vested rights doctrine. 1 F.3d 1487. The *Plaut* court, stating that "Congress may not require the federal courts to nullify or vacate their properly rendered judgments, regardless of what injustice Congress believes those judgments have visited upon private parties," 1 F.3d at 1499, concluded that section 27A(b) amounts to an unconstitutional congressional usurpation of the judicial power. Judge Keith dissented in part in *Plaut*, concluding that section 27A(b) is unconstitutional only as applied to those cases whose journey through the courts had completely come to an end at the time section 27A was enacted. *Id.* at 1500. Judge Keith would hold that section 27A(b) is valid as applied to those cases that had been dismissed but were not yet final on the date of enactment — *i.e.*, availability of appeal or certiorari not yet expired. *Id.*

In the instant case, as in *Pacific Mut.* and *Plaut*, Plaintiffs' case had reached final judgment prior to the enactment of section 27A. Plaintiffs did not appeal the district court's grant of summary judgment in favor of Defendants, and by the time Congress enacted section 27A, the time for appeal had expired. We must therefore address for the first time whether, to the extent that section 27A(b) purports to reopen final and nonappealable judgments, section 27A(b) is a constitutional exercise of Congress's legitimate powers. For the reasons discussed below,

we conclude that Congress cannot, consistent with the constitution, direct a federal court to reinstate a final, nonappealable judgment pursuant to section 27A(b).

II.

Plaintiffs contend that section 27A(b) does not violate the vested rights doctrine as applied in this case because their section 10(b) claims were never litigated on the merits. Instead, Plaintiffs claims were dismissed as untimely based on the *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) statute of limitation, and according to Plaintiffs, statutes of limitation do not give rise to vested rights. The government argues that section 27A(b) does not violate the vested rights doctrine because given that Plaintiffs' claims were initially ruled timely, and then rendered retroactively untimely by *Lampf*, "[t]he judgment thus amounts to a retroactive windfall for the defendants, one resting not on the merits of the case but on a purely non-substantive ground." The government also argues that Defendants cannot claim a vested right in their judgment because they could not justifiably rely on the *Lampf* rule given that Congress enacted section 27A only a few months after Plaintiffs' section 10(b) claims were dismissed. Finally, the government asserts that Defendants cannot have a vested right in their final judgment because the courts have the authority to deprive them of such judgment at any time under Rule 60(b), and Defendants cannot assert a greater right against one branch of government than against another.

The nature of the vested rights doctrine is twofold. The doctrine has a due process component premised upon the acknowledgment that once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property. *Axel Johnson v. Arthur Anderson & Co.*, 1993 U.S. App. LEXIS 24954, at *16 (2d Cir. Sept. 27, 1993); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); *Tonya K. v. Board of Educ.*, 847 F.2d 1243,

1247-48 (7th Cir. 1988); *Treiber v. Katz*, 796 F. Supp. 1054, 1059-60 (E.D. Mich. 1992); *see also Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy*, 739 F.2d 1472, 1477 (10th Cir. 1984) ("the [Supreme] Court has indicated that it would not allow a legislature to interfere with an adjudicated right"). In cases involving Congress and the federal judiciary, the vested rights doctrine also has a separation of powers component which prevents Congress from sitting as a "court of errors" with the power to suspend or revise final judgments of the federal courts. *See Axel Johnson*, 1993 U.S. App. LEXIS 24954, at *17; *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493 (6th Cir. 1993).[6]

The case perhaps most often cited for the vested rights doctrine is *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), in which the Supreme Court held that the legislature lacks the power to take away rights that have been vested by final judgment. In *McCullough*, a taxpayer obtained a final judgment for a tax refund against the State of Virginia. Prior to execution of the judgment, the Virginia legislature attempted to prevent the taxpayer from collecting his refund by repealing the legislation that had originally entitled him to it. The Supreme Court held that the legislature was prevented from doing so because:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id.

Although the government points out that *McCullough* represents the only occasion where the Supreme Court has invalidated legislation under the vested rights doctrine, the government does not, indeed it could not, dispute that *McCullough* remains valid law. *See also Plaut*, 1 F.3d at 1493 n.12

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[6] We address the separation of powers issue *infra* part III.

(dismissing government's implication that vitality of *McCullough* is questionable). In fact, the Court has reiterated the vested rights principle underlying *McCullough* on several occasions. *See e.g., Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948) ("[j]udgments within the powers vested in [Article Three] courts . . . may not be unlawfully revised, overturned or refused faith and credit by another Department of Government"); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923) ("the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation"); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) ("it is undoubtedly true that legislatures cannot set aside the judgments of courts"); *United States v. Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1875) (invalidating attempt by Congress to revise a final judgment entered by the Court of Claims because "where no appeal is taken to [Supreme Court], [such judgments] are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by [Claims] court"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) ("[an] act of Congress cannot have the effect and operation to annul the judgment of the court already rendered or the rights determined thereby"); *Massingill v. Downs*, 48 U.S. (7 How.) 760, 768 (1849) ("no legislative act can change the rights and liabilities of parties which have been established by solemn judgment").

Plaintiffs and the government cite several cases in which, they argue, the Supreme Court has upheld legislation that disturbs final judgments and divests private litigants of the rights recognized by those judgments. We find each of these case [sic] distinguishable.

In *Fleming v. Rhodes*, 331 U.S. 100 (1947), the Court sustained legislation which prevented private landlords from enforcing eviction judgments obtained against private tenants. However, as distinct from the instant case, the legislation at issue in *Fleming* did not compel courts to reopen final judgments;

rather, the legislation merely directed courts to enjoin *future* proceedings by the appellant. Likewise, in *Usery v. Turner Elkhorn Mining Corp.*, 428 U.S. 1 (1976), the Court upheld legislation imposing liability on coal companies for past acts. Although the legislation created liability for prior acts, it did not compel an upset of a final, nonappealable judgment.[7]

Other cases cited by Plaintiffs and the government are also distinguishable. In *Campbell v. Holt*, 115 U.S. 620 (1885), and *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945), the Court rejected challenges to state statutes that extended statutes of limitation after such statute had barred a right of action. Neither case, however, involved a final judgment. Finally, in *Wheeling Bridge*, 59 U.S. (18 How.) 421, and *Hodges,* 261 U.S. 600, the Court upheld legislation that deprived the litigants of their vested rights in final judgments. In both cases, however, the Court did so because the rights involved were public rights — as opposed to the private rights asserted here — and a judgment declaring a public right may be annulled by subsequent legislation. *Wheeling Bridge*, 59 U.S. (18 How.) at 431; *Hodges,* 261 U.S. at 603-04. In *Wheeling Bridge*, the Court specifically distinguished adjudications involving private rights stating, "[w]hen [private rights] have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it." 59 U.S. (18 How.) at

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[7] Plaintiffs also rely on *Freeland v. Williams,* 131 U.S. 405, 417-21 (1889), in which the Court upheld a state constitutional amendment which prevented a private litigant from enforcing a final judgment for trespass damages. *Freeland,* however, predated *McCullough,* and therefore, to the extent, if any, that *Freeland* conflicts with *McCullough's* pronouncements, *McCullough* controls.

431.[8] Having addressed these cases, we conclude that the vested rights doctrine as described in *McCullough* remains vital.

We now address Plaintiffs' and the government's specific arguments relating to the application of the vested rights doctrine in this case. First, we hold that the fact that final judgment was rendered in favor of Defendants on the basis of a statute of limitations does not change the basic principle that Congress cannot upset the judgment through subsequent legislation. We reject Plaintiffs' argument that Defendants' judgment is not a judgment on the merits. In *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir.), *cert. denied*, 112 S. Ct. 407 (1991), we specifically held that a dismissal on limitations grounds is a judgment on the merits, unless the court specifies otherwise.

We similarly reject Plaintiffs' argument that Defendants have no vested right in their judgment because statutes of limitations do not give rise to vested rights. Plaintiffs' argument simply

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[8] Plaintiffs and the government also cite, without analysis, *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). In *Paramino*, the Supreme Court upheld a private act of Congress which authorized the reopening of an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50. In upholding the special legislation, the Court emphasized:

> This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim.

Id. at 378. *Paramino*, as distinguished from the instant case, authorized the reopening of an administrative hearing, not a final judgment of a federal court. Furthermore, in approving the private act in *Paramino*, the Court specifically noted that the act "[did] not set aside a judgment," *Id.* at 378, whereas in the instant case that is exactly what section 27A(b) purports to do. Moreover, contrary to the situation in *Paramino*, where the legislation cured a defect in the administrative process, it has never been claimed here that a defect existed in the district court's grant of summary judgment in favor of Defendants. For these reasons, we conclude that *Paramino* is inapposite.

misses the point. We agree that Congress has the power to change limitations periods, and as a result, a party cannot claim a vested right to a prior limitations period. *See Plaut*, 1 F.3d at 1495, *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945). However, Defendants do not claim a vested right in a specific limitations period. Instead, Defendants' vested right is in the *final judgment* obtained in their favor.

We also join the court in *Plaut*, 1 F.3d 1487, in rejecting the government's argument that because the final judgment in this case rested on statute of limitations grounds, the judgment is somehow less fundamental and more vulnerable to legislative revision than a final judgment in which the true merits of the case were addressed. A decision by a federal court adjudging a claim to be time barred is a final judgment on the merits, and, once a claim is so adjudged, Congress cannot direct the court to reopen the judgment and apply a new statute of limitations. *Plaut*, 1 F.3d at 1496. As the court in *Plaut* stated:

> [w]here a federal court enters judgment in a case on the basis of a time bar, it confers upon the prevailing party a right based on the protections that the time bar provides. Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power.

Id.

We likewise reject the government's argument that Defendants should not be able to claim a vested right in their final judgment because of the resultant "windfall" that *Lampf* bestowed on them, and because of the speed with which Congress acted in undoing *Lampf*. With regard to the alleged windfall, "Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power." *Plaut*, 1 F.3d at 1498-99. Furthermore, that Congress acted quickly in enacting

section 27A does not make Defendants' final judgment any less final. *Id.* at 1498 ("some final judgments are less final than others only to the extent that some pregnant women are less pregnant than others").

Finally, the only argument against the application of the vested rights doctrine in this case that gives us pause is the government's argument that Defendants cannot have a vested right in their final judgment because the courts have the authority to deprive them of such judgment at any time under Rule 60(b)(6), and Defendants cannot assert a greater right against one branch of government than against another. The government argues that because the courts may deprive a litigant of a vested right in a final judgment via Rule 60(b), Congress may enact legislation that deprives a private party of a vested right in a final judgment as long as the legislation passes rational basis review. We disagree.

The power of the courts to reopen final judgments under Rule 60(b) is narrow and subscribed. Under Rule 60(b)(1)-(5), the courts may only reopen cases for those reasons specifically enumerated, and reasons (1), (2), and (3) are limited to motions made within one year of final judgment.[9] Although Rule 60(b)(6) allows motions that are made within a reasonable

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[9] Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse part; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed of [sic] otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

time and allows relief "for any other reason justifying relief," this subsection has been narrowed by case law to apply only in extraordinary circumstances. *See infra* part IV. In other words, courts do not have unbridled discretion, under Rule 60(b), to deprive private parties of a their vested rights in final judgments. Furthermore, we note that under Rule 60(b), final judgments are subject to a case-by-case evaluation by a tenured judge who is free from political pressure. The Rule 60(b) guidelines are far different from the rational basis review the government would advance for legislative action to deprive a private litigant of his or her final judgment. Given these differences, we cannot say that in this instance, claiming a vested right in a final judgment against Congress amounts to claiming a greater right against one branch of government than another. Just as Defendants have a vested right in their final judgment against any sweeping "rationally-based" power on the part of the judiciary to upset that judgment, they have the same right against Congress. Finally, although Rule 60(b) authorizes the judiciary to upset final judgments, an attempt by Congress to do so violates the principle of separation of powers. *See infra* part III.

III.

Defendants contend that in section 27A(b) Congress unconstitutionally usurps the role of the judiciary by upsetting final judgments. According to Defendants, section 27A(b) impermissibly places Congress in the position of a court of last resort. Plaintiffs maintain that we have already concluded in *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), that section 27A represents a proper exercise of Congress's legislative authority.

The Framers of our Constitution long ago recognized that "the preservation of liberty requires that the three great departments of power should be separate and distinct." *The Federalist No. 47* (James Madison). Because the Constitution grants to Congress extraordinarily broad powers, the Framers perceived that the Legislative Branch posed a special threat to the balance

of power within our system: "[i]ts constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." *The Federalist No. 48* (James Madison). Thus, the Constitution imposes constraints on the Congress to "forestall the danger of encroachment 'beyond the legislative sphere.' " *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2311 (1991).

The Supreme Court has repeatedly "given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). "As [the Court] stated in *Buckley v. Valeo*, 424 U.S. 1 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' " *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley*, 424 U.S. at 122). Over the years, the Supreme Court "has not hesitated to invalidate provisions of law which violate this principle." *Id.*

As recognized by the Sixth Circuit in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1492-93 (6th Cir. 1993), the Supreme Court first spoke directly on the proper relationship between the legislature and the judiciary in *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792). In *Hayburn's Case,* the Court addressed a congressional statute which gave the federal courts the authority to determine whether disabled veterans of the Revolutionary War were entitled to pensions, and if so, the amount of the pensions. The statute provided, however, for the Secretary of War to review the decision of the court and transmit his opinion to Congress for its approval.

Prior to the decision, Congress amended the statute to provide other relief for the veterans, and the Supreme Court dismissed the case as moot. Nevertheless, the views of the justices of the Supreme Court were noted in a footnote to the dismissal because they "involve[d] a great constitutional question." *Hayburn's Case,* 2 U.S. (2 Dall.) at 409. These views were expressed by the justices and district judges, sitting on New York, Pennsylvania, and North Carolina circuit court panels, in their independent and unanimous refusals to execute the statute and hear the pensioners' applications. The panels refused to entertain the applications, concluding that the statutory scheme, which provided for review of federal court decisions by the Secretary of War and Congress, violated the principle of separation of powers. "This result was in essence the Court's first invalidation of an act of Congress." *Plaut,* 1 F.3d at 1492.

The justices sitting on the panel in New York stated:

> That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.
>
> That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary of war, and then to the revision of the legislature; whereas, *by the constitution, neither the secretary of war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.*

Hayburn's Case, 2 U.S. (2 Dall.) at 410 (emphasis added). The justices sitting on the Pennsylvania panel jointly mailed a letter to President George Washington in which they declared:

> [N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to

> the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

Id. at 412.

The principle from *Hayburn's Case* that "[t]he federal judiciary will not have its decision in a case frustrated by having it subjected to revision, suspension, modification, or other review by the executive or legislative branches," John E. Nowak, Ronald D. Rotunda, J. Nelson Young, *Constitutional Law* 67 (3d ed. 1986), has been consistently reiterated.[10] *See also* 13 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3529.1 (1984) ("[a] judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion"). Indeed, excepting the Fifth Circuit's opinion in *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993), we cannot locate a single case where a court has upheld an attempt

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[10] There are two exceptions to this general rule. The first is that Congress can waive the res judicata defense when a prior judgment has been entered in the government's favor on a claim against the government. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Congress may also enact legislation that annuls a final judgment when the remedy chosen — *i.e.*, an injunctive decree rather than damages at law — directly affects public versus private rights. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421; *see also supra* part II. Section 27A(b) does not fall within either of these exceptions.

by Congress to upset a final, nonappealable judgment in a case between private parties.[11]

In *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874), the Supreme Court held that the Secretary of the Treasury could not withhold a "tax" from a claimant who had been awarded a sum of money for the net proceeds of cotton in his original suit against the United States. In the original suit in the Court of Claims, the government made no counterclaim for the tax, nor claimed any set-off. As a result, the Court concluded that the Secretary could not later withhold the tax because, "it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *Id.* at 648. The Court went on to say that "the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive." *Id.* Similarly, in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Court, declaring that a intervening law must be applied to a pending case, emphasized that this is true when the change in the

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[11] We disagree with The Fifth Circuit's analysis regarding section 27A(b) and final judgments. In *Pacific Mut.*, the court relies upon *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, and *Sioux Nation*, 448 U.S. 371, in concluding that "the Constitution permits Congress and the judiciary to share authority in deciding when a court is finished deciding a particular controversy between individuals." 997 F.2d at 54. Although we agree that the two branches share such authority while a case is still pending, Congress's authority to say when a controversy is over ends when the case's journey through the courts comes to an end. *See Campbell v. Holt*, 115 U.S. 620, 628 (1885) (statutes of limitations "have always been held to be within the legislative power *until the bar is complete*") (emphasis added). Moreover, *The Schooner Peggy* and *Sioux Nation* fail to support the Fifth Circuit's sweeping statement. In *The Schooner Peggy*, the Court held that the treaty entered into after judgment applied because the parties had appealed the determination, making the judgment not yet final at the time the law changed. 5 U.S. (1 Cranch) 108-110. Furthermore, *Sioux Nation* merely represents one of the exceptions to the general rule that Congress may not upset final judgments. *See supra* note 10. We therefore remain convinced that under the rule of *Hayburn's Case*, section 27A(b), as applied to final, nonappealable judgments, is unconstitutional.

law occurs "subsequent to the judgment, *and before the decision of the appellate court.*" *Id.* at 110 (emphasis added).

In *Daylo v. Administrator of Veterans' Affairs,* 501 F.2d 811 (1974), the D.C. Circuit took great pains to interpret a congressional statute dealing with veterans' benefits so that the statute did not seek to annul final judgments based on prior law. Although the court acknowledged that the statute could be interpreted such that Congress intended such judgments to be overturned, it avoided this construction "in light of the constitutional difficulties that this construction would pose." *Id.* at 823. Likewise, in *Georgia Ass'n of Retarded Citizens v. McDaniel,* 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied,* 490 U.S. 1090 (1989), the Eleventh Circuit interpreted the attorney fees retroactivity provision of the Handicapped Children's Protection Act ("HCPA") of 1988, 20 U.S.C. § 1415(e), so that it did not apply to final, nonappealable judgments rendered prior to the date HCPA became law. In doing so, the court noted that the principle of separation of powers "protects judicial action from superior legislative review, 'a regime [that would be] obviously inconsistent with due process of law and subversive of the judicial branch of government.' " *Id.* at 810 (quoting *Daylo,* 501 F.2d at 816).[12]

Hayburn's Case enunciated the separation of powers principle that Congress cannot, consistent with the Constitution, upset final judgments of federal courts. This principle remains as alive today as it was when our nation was founded. In *Hayburn's Case,* Congress attempted to reserve to itself the power to revise final judgments of federal courts. *See Plaut,* 1 F.3d at 1493. Because

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[12] *Tonya K. v. Board of Educ.,* 847 F.2d 1243, 1247-48 (7th Cir. 1988), also addressed the HCPA attorney fees retroactivity provision. The court upheld the constitutionality of the statute and affirmed the district court's grant of Rule 60(b) relief reopening the case for a determination of fees, because it interpreted the statutory provision to be a mere "invitation" by Congress to the courts to reconsider the issue. *Id.* at 1247. In so holding, the *Tonya K.* court emphasized that "once a court has disposed of a case, Congress may not dictate a different decision[;] . . . [i]t may create new legal rights within the courts' jurisdiction even when it may not revise judgments." *Id.*

Congress attempts, in section 27A(b), to actually exercise that same power, section 27A(b), as it applies to final, nonappealable judgments, cannot stand.

Contrary to Plaintiffs' assertion, our conclusion today is not inconsistent with our holding in *Anixter,* 977 F.2d 1533. Although we made fairly broad pronouncements in that case as to the constitutionality of section 27A, the underlying case in *Anixter* was still before the courts at the time section 27A was enacted, and our analysis in *Anixter* was confined to that precise situation. Even though, as we concluded in *Anixter,* Congress can legitimately exercise its legislative power to affect cases before the courts at the time it enacted section 27A, we hold today that, with respect to cases that were final and nonappealable at the time section 27A became law, Congress cannot do so.

IV.

Plaintiffs argue that the district court abused its discretion in denying their Rule 60(b) motion for relief from judgment. We will reverse the district court's determination "only if we find a complete absence of a reasonable basis and are certain that the district court's decision is wrong." *Pelican Prod. Corp. v. Marino,* 893 F.2d 1143, 1147 (10th Cir. 1990).

Rule 60(b)(6) provides for relief for "any other reason justifying relief from the operation of the judgment." Relief under Rule 60(b)(6) is discretionary and is warranted only in exceptional circumstances. *Pelican,* 893 F.2d at 1147. Absent exceptional and compelling circumstances, a litigant is not entitled to relief under Rule 60(b)(6) when the litigant made an informed and intelligent decision not to appeal. *Ackermann v. United States,* 340 U.S. 193, 200 (1950).

We have described Rule 60(b)(6) as a "grand reservoir of equitable power to do justice in a particular case." *Pierce v. Cook & Co.,* 518 F.2d 720 (10th Cir. 1975) (en banc) (citation omitted), *cert. denied,* 423 U.S. 1079 (1976). In *Pierce,* we were confronted with "[t]he kind of legal error that provides the

extraordinary circumstances justifying relief under Rule 60(b)(6)." *Van Skiver v. United States,* 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied,* 113 S. Ct. 89 (1992). We granted Rule 60(b)(6) relief in *Pierce* based on a post-judgment change in the law "arising out of the same accident as that in which the plaintiffs . . . were injured." 518 F.2d at 723.[13] Absent a post-judgment change in the law in a factually-related case, however, "we have held that 'a change in the law or in the judicial view of an established rule of law' does not justify relief under Rule 60(b)(6)." *Van Skiver,* 952 F.2d at 1245 (quoting *Collins v. City of Wichita,* 254 F.2d 837, 839 (10th Cir. 1958)).

We conclude that the district court did not abuse its discretion in refusing to grant Plaintiffs' motion for relief under Rule 60(b)(6). We first note that as the Second Circuit determined in *Axel Johnson v. Arthur Anderson & Co.,* 1993 U.S. App. LEXIS 24954, at *21 (2d Cir. Sept. 27, 1993), "motions for reinstatement under section 27A(b) should be brought under the statute itself, rather than under the discretionary mechanism of Rule 60(b)(6)." Moreover, even if a Rule 60(b)(6) motion is an appropriate means for seeking relief in this case, the fact remains that Plaintiffs failed to appeal the district court's grant of summary judgment in favor of Defendants. Plaintiffs now claim that they chose to forego an appeal because to do so would have been frivolous; however, as Defendants point out, Plaintiffs did choose to defend against the motion for summary judgment, presumably on nonfrivolous grounds. In any event, the decision not to appeal was informed and intelligent. Moreover, Plaintiffs

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[13] In *Pierce,* a diversity case in which the plaintiff sued the truckdriver's employer for his negligence in causing a traffic accident, summary judgment was granted in favor of the employer. 518 F.2d at 721. Subsequently, a suit brought in state court by one of the passengers in the *Pierce* plaintiff's car—who was injured in the same accident—resulted in a change in Oklahoma law creating liability on the part of the employer for the negligence of the carrier. *Id.* at 722. Because "[t]he federal courts in which plaintiffs were forced to litigate ha[d] given them substantially different treatment than that received in state court by another injured in the same accident," *id.* at 723, we granted Rule 60(b)(6) relief.

claim for relief is premised on the change in law occasioned by section 27A, and although the result may be harsh, section 27A did not arise out of a *Pierce*-type factually-related incident, therefore the section 27A change in law does not warrant Rule 60(b)(6) relief. For these reasons, we conclude that the district court did not abuse its discretion.

V.

In summary, we hold that section 27A(b) as it applies to the final, nonappealable judgment in this case is unconstitutional as violative of the vested rights doctrine and the principle of separation of powers. We further conclude that the district court did not abuse its discretion in denying Plaintiffs Rule 60(b)(6) relief.

AFFIRMED.

No. 92-1186, Johnston v. Cigna Corporation

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion forcefully argues both the "vested rights" and the separation of powers propositions in holding § 27A(b) unconstitutional. After careful consideration, I am persuaded that the arguments for upholding the statute have the better logic and support.

There are two principal attacks on § 27A that are advanced to us. First, the defendants-appellees argue that the statute would, by permitting the reopening of a final unappealed judgment, violate what they term "the constitutional vested rights doctrine," relying heavily on *McCullough v. Virginia*, 172 U.S. 102 (1898). Brief for Defendants-Appellees at 14, 16. Second, the

defendants argue that § 27A also violates the separation of powers doctrine because it has no prospective effect. *Id.* at 33.[1]

I.

The argument premised on the "vested rights" theory is mainly grounded on *McCullough*. That case involved state bond coupons — contracts between the State of Virginia and the bondholders. The state had passed a law making it illegal to pay taxes using bond redemption coupons in lieu of cash, and instead required bondholders to pay their taxes normally and sue for a "refund" based on the value of their bondholdings later. McCullough did so, sued for his refund, won, and had his judgment affirmed on appeal. Later, the Virginia legislature passed retroactive legislation repealing the statute that authorized the taxpayer's particular form of suit. The Supreme Court held that it was "not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough*, 172 U.S. at 123.

It is important to remember, however, that in *McCullough*, the Court discussed at length the contract rights that were involved. Referring to an earlier decision in *Hartman v. Greenhow*, 102 U.S. 672, 679 (1880), the Court quoted a statement that "a contract was thus consummated between the State and the holder of the new bonds, and the holders of the coupons . . . ." *McCullough*, 172 U.S. at 107. Later, *McCullough* noted that while it is undoubtedly the general rule to accept a construction placed by the courts of a state on its statutes, one exception was always recognized "in reference to the matter of contracts alleged to

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[1] Defendants say that they are not discussing their arguments made below similar to those rejected by this court in *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied sub nom. Dennler v. Trippet*, 113 S. Ct. 1841, and *cert. denied sub nom. Thorner v. Cross*, 113 S. Ct. 1842 (1993), while they respectfully disagree with *Anixter*. Defendants, however, do not abandon those arguments made below and incorporate them by reference for possible use in seeking en banc review, or in a petition for certiorari. Brief for Defendants-Appellees at 36 n.25.

have been impaired." *Id.* at 109. Indeed, the contract rights discussion predominates through most of the opinion. *Id.* at 106-123. This does not destroy the force of the holding of lack of power for the legislation to take away rights "which have been once vested by a judgment," but the pronouncement of the rule in the context of contract rights and an established money judgment inform our analysis and application of the *McCullough* holding.

The significance of the contract rights background is reinforced by *Lynch v. United States,* 292 U.S. 571 (1934), where the Court held invalid under the Due Process Clause legislation depriving private individuals of rights under renewable term insurance issued under the War Risk Insurance Act. The Court recognized that mere withdrawal of consent to suit against the government on the policies would not imply repudiation. So long as the contractual obligation was recognized, Congress could direct the fulfillment of the contractual obligation without interposition of a court or an administrative tribunal. *Id.* at 582. However, because the legislation involved obviously intended to abolish rights, and not remedies, it was held invalid under the Fifth Amendment prohibition against the taking of property without just compensation. *Id.* at 579, 585. In *Pacific Mutual Life Ins. v. First Republicbank Corp.,* 997 F.2d 39, 46-47 (5th Cir. 1993), *cert. pending* (Oct. 18, 1993), Judge Reavley notes that the Due Process Clause foundation for *McCullough* has been recognized by the Supreme Court. *E.g., Hodges v. Snyder,* 261 U.S. 600, 602-03 (1923). Thus the *McCullough* pronouncement about "vested rights" should be read as one of due process protection of a judicial determination of contract rights.

The reasoning in *Pacific Mutual, supra,* is persuasive to me for upholding § 27A, despite *McCullough* and the "vested rights" argument of defendants. *Pacific Mutual* traces the history of *McCullough* and points out significant cases which do not recognize any absolute rule on the sanctity of prior unappealed judgments, notably *Fleming v. Rhodes,* 331 U.S. 100 (1947), and *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976). In *Fleming,*

landlords who sought to evict tenants under state judgments recovered in suits for the restitution of leased property following the lapse of wartime price regulations. State court judgments for eviction were entered as sought but, after a brief hiatus, Congress enacted curative legislation prohibiting the eviction of tenants and extending the price regulations. The Supreme Court reversed a federal district court ruling that the new statute violated the Fifth Amendment Due Process Clause, stating:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." *The rights acquired by judgments have no different standing.*

Fleming, 331 U.S. at 107 (emphasis added) (footnotes omitted).

The majority opinion would distinguish *Fleming* on the reasoning that the law in question did not compel the state courts to reopen final judgments, but merely directed the courts to enjoin future eviction proceedings by the appellant. This analysis is unpersuasive. The impact on the landlords is the same as if the judgments for eviction had been formally set aside. Reliance on form over substance by the majority is unconvincing. Since the constitution authorized the subsequently enacted legislation in *Fleming* for its important purposes, there was no due process violation there, nor is there here.

The reasoning from *Fleming* and its holding were reaffirmed in *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958). The Court there stated that in *Fleming* it

> was held that the landlord could be enjoined from evicting the tenants under the state judgment, as any "vested" rights by reason of the state judgment were acquired subject to the possibility of their dilution

> through Congress' exercise of its paramount regulatory power.

Id. at 91 n.6. *See also Paramino Lumber Co. v. Marshall,* 309 U.S. 370, 375, 377-78 (1940) (upholding constitutionality of an Act ordering Compensation Commission to review case and issue new order, despite finality of the earlier unappealed order; no due process violation occurred since Act did not direct entry of an award).

The majority opinion here relies on the forceful decision in *Plaut v. Spendthrift Farm, Inc.,* 1 F.3d 1487 (6th Cir. 1993). Nevertheless, I remain convinced that *Pacific Mutual* has the stronger reasoning and that § 27A should be upheld as the Fifth Circuit has done. In enacting § 27A to limit the retroactive impact of *Lampf* and *Beam* on investors claiming fraudulent wrongs, Congress exercised its "paramount regulatory power," *FHA v. Darlington, Inc.,* 358 U.S. at 91 n.6. The Supreme Court has thus described § 27A's remedial action:

> Congress intervened by limiting the retroactive effect of our decision, and the caution in its intervention is instructive. In an approach parallel to the one it adopted for the insider trading statute, Congress did no more than direct the applicable "limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*]." 15 U.S.C. § 78aa-1 (Supp. III).

Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2089 (1993).

Congress thus protected from the severity of *Lampf* and *Beam* the large number of pending claims of securities fraud which would otherwise be barred. In doing so, no contract rights merged into a judgment were upset as in *McCullough.* The remedial statute instead merely provided for reopening of dismissals grounded on limitations, not on the lack of merit of the claims made under § 10(b) and Rule 10b-5. This is a proper regulatory

function, in my judgment. The Supreme Court has "emphasized that the private enforcement of the Securities laws as a supplement to SEC action, was highly desirable." *Grace v. Ludwig,* 484 F.2d 1262, 1267 (2d Cir. 1973), *cert. denied,* 416 U.S. 905 (1974) (citing *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964)); *see also Wechsler v. Southeastern Properties, Inc.,* 506 F.2d 631, 635 (2d Cir. 1974). The Supreme Court has noted that private litigants "act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority[]' " and that "[t]he role of 'private attorneys general' is not uncommon in modern legislative programs." *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 211 (1972) (citing *J. I. Case Co. v. Borak, supra;* other citations omitted). Thus, the remedial measures undertaken in § 27A are freighted with the public interest, and do not merely deal with private rights.

For these reasons and others forcefully given in *Pacific Mutual* by the Fifth Circuit, I would hold that the "vested rights" arguments of the defendants do not justify invalidating the statute.

II

Defendants' remaining contention is that § 27A violates the separation of powers doctrine, arguing *inter alia* that: (1) the statute has no prospective effect; (2) the statute is not a valid exercise of legislative authority under Article I; and (3) in *Anixter,* 977 F.2d at 1544, this court did not address Article I. Brief for Defendants-Appellees at 33, 35.

In *Anixter,* 977 F.2d at 1544-47, this court held that § 27A does not violate the separation of powers doctrine. It is true that the instant case concerns final and unappealed summary judgments granted on the ground that the claims of plaintiffs were time-barred, while in *Anixter* the judgments had not become final. This, however, does not deprive the forceful reasoning of *Anixter* of meaning here. There was extended analysis of the

separation of powers issue and it is instructive. At the outset the *Anixter* court said clearly that it could not "avoid deciding whether the separation of powers doctrine barred Congress from enacting § 27A." 977 at 1544. It then distinguished *United States v. Klein,* 80 U.S. 128 (1871), noting that § 27A does not "direct courts to make specific factual findings or mandate a result in a particular case." *Anixter,* 977 F.2d at 1545. "Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991." *Id.* We concluded that:

> Section 27A does not direct certain factual findings or impose a rule of decision for § 10(b) claims. It changes the law. *Axel Johnson,* 790 F.Supp. at 476. "Section 27A merely turns back the legal clock to the period just prior to *Lampf* and then permits courts independently to adjudicate any reopened actions on the basis of the law as they determine it then existed." *Adler v. Berg Harmon Assocs.,* 790 F.Supp. 1235, 1243 (S.D.N.Y. 1991).
>
> Indeed, Section 27A changes the law and was intended to change the law. Before its enactment, all § 10(b) claims were governed by the one-year/three-year *Lampf* statute of limitations as applied retroactively by *Beam.* "Section 27A changed the law by limiting the one-year/three-year rule to prospective application only and by subjecting Section 10(b) claims filed prior to June 19, 1991 to the limitations period determined to be applicable by the court in which the action was filed." *Berg Harmon,* 790 F.Supp. at 1243.
>
> *In enacting Section 27A, Congress exercised a key legislative power.* Statutes of limitations traditionally reside in the legislative branch. "They have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right. . . . " *Chase Sec.*

> *Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) . . . *"Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." Axel Johnson,* 790 F.Supp. at 483.
>
> It is this peculiar realm of legislative prerogative which nullifies defendants' additional contentions of denial of due process and equal protection, propped on the belief our prior dismissal gave them a vested right in a judgment that Congress cannot now annul. . . .
>
> * * *
>
> Consequently, we hold § 27A constitutional. Plaintiffs timely moved to reinstate their claims under § 27A(b). We therefore reinstate the verdict with regard to the relief awarded for violations of § 10(b) and Rule 10b-5.

Anixter, 977 F.2d at 1545-47 (emphasis added).

Defendants' argue that § 27A has no prospective effect at all and that Congress may not enact such a statute. However, such a statute was upheld in *Paramino Lumber Co.,* 309 U.S. at 374-75. The statute in *Paramino* which operated on the prior injury and award was retrospective, but was held valid against due process objections under the Fifth Amendment. *Id.* at 378. And the Court concluded by rejecting a separation of powers challenge to this retroactive legislation: "Nor can we say that this legislation is an excursion of the Congress into the judicial function." *Id.* at 381.

What we said in *Anixter* answers sufficiently the notion that we did not deal with Article I powers there. We held that in "enacting Section 27, *Congress exercised a key legislative power. Statutes of limitations traditionally reside in the legislative branch."*

Anixter, 977 F.2d at 1546 (emphasis added). The obvious reference is to Article I powers. Moreover, the contention that the statute violates the separation of powers doctrine because it operates only retroactively is unpersuasive. I agree with *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1573 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993), which rejected that point. "We fail to see the significance of such a distinction [between partial and total retroactivity]. The central issue is whether section 27A violates separation of powers principles by interfering with judicial decision-making. The presence of an additional prospective effect in no way lessens such interference if it exists at all" — which the court held was not the case. *Id.* at 1573.

I feel that *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), is instructive on the extent of Congressional power in this context. In *Sioux Nation*, there was an earlier determination by the Court of Claims that a 1942 decision operated as res judicata so that a fair dealings claim of the Sioux was barred. In 1978 Congress lifted the res judicata bar and authorized the taking of new evidence. The new Act was upheld against a separation of powers challenge. The Court held that Congress had the power to waive the res judicata bar of the prior judgment; this was a proper Article I exercise of power. *Id.* at 396-97. Congress did not attempt to award judgment, grant a new trial, reverse a decree of the court, nor interfere with the administration of justice. *Id.* at 398. Similarly here I feel Congress properly acted within the range of its Article I powers and did not trench upon the judiciary in merely allowing a new day in court on the claims that had been held time barred after *Lampf* came down. *See also Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993) (§ 27A does not violate the separation of powers doctrine); *Berning v. R. G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993) (same); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993) (same).

In sum, I am unconvinced that the separation of powers or "vested rights" challenges to § 27A overcome the statute's presumption of constitutionality. We should uphold it. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 92-1186
(D.C. No. 90-B-177)

LARRY D. JOHNSTON, LAWRENCE G. LYON, H. RODGERS COMPANY,

Plaintiffs-Appellants,

v.

CIGNA CORPORATION, INC.; CIGNA SECURITIES; CIGNA HOLDINGS, INC.; M. DOAK JACOWAY; CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY; CIGNA FINANCIAL PARTNERS, INC., A DELAWARE CORPORATION,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor,

SECURITIES AND EXCHANGE COMMISSION,

Amicus Curiae.

ORDER
Entered February 1, 1994

Before Seymour, Chief Judge, Holloway, Logan, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, and Kelly, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing in banc were transmitted to all of the judges of the court in regular service. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judge Holloway voted to grant rehearing in banc.

Entered for the Court
ROBERT L. HOECKER,
Clerk

By _____
Patrick Fisher
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-177

LARRY D. JOHNSTON, LAWRENCE G. LYON, AND H. RODGERS COMPANY,

Plaintiffs,

v.

CIGNA CORPORATION, CIGNA INDIVIDUAL FINANCIAL SERVICES CO., CIGNA SECURITIES, INC., CIGNA FINANCIAL PARTNERS, INC., CIGNA HOLDINGS, INC., AND M. DOAK JACOWAY,

Defendants.

MEMORANDUM OPINION AND ORDER

Babcock, J.

Plaintiffs move for reinstatement of their claim under § 10(b) of the 1934 Securities and Exchange Act and Rule 10b-5 pursuant to § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, P.L. No. 102-242. Plaintiffs also move under Fed. R. Civ. P. 60(b)(6) to set aside the final judgment entered in this action. Pursuant to 28 U.S.C. § 2403, notice of the claim of unconstitutionality was sent to the U.S. attorney general on February 20, 1992. Hearing on these motions was held on March 20, 1992.

I conclude that § 476 violates the principle of the separation of powers. It further impermissibly upsets a final judgment of this court. Therefore, I hold the section is facially unconstitutional and unconstitutional as applied. Accordingly, plaintiffs' motion to reinstate is denied. Because plaintiffs' Rule 60(b) motion is premised on an intervening change in the law which I hold to be invalid, that motion is denied.

In accordance with *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ____ U.S. ____ , 111 S.Ct. 2773 (1991), *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____ , 111 S.Ct. 2439 (1991), and *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420 (10th Cir. 1991), defendants moved for summary judgment on the ground that plaintiffs' claims under § 10(b) were time barred. In my order of October 10, 1991, I granted that motion and final judgment entered that same day in favor of defendants and against plaintiffs.

On November 27, 1991, Congress enacted § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991. That provision attempts to add a new section 27A to the 1934 Act, and states in relevant part:

> The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991....
>
> Any private action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time-barred subsequent to June 19, 1991...
>
> shall be reinstated on motion by the plaintiff....

Congress did not otherwise amend the 1934 Act by writing an express statute of limitation and repose into § 10(b).

Plaintiffs timely moved to reinstate their § 10(b) claims. Defendants oppose the motion, arguing that § 476 violates the principle of the separation of powers and that it unconstitutionally reopens a final judgment. In *Bank of Denver v. Southeastern Capital Group, Inc.*, No. 90-B-1551, ____ F. Supp. ____ (D. Colo. 1992), I held that § 476 violates the principle of separation of powers. Therefore, as plaintiffs' motion to reinstate depends on an unconstitutional law, the motion is denied. However, because

of the likelihood of appeal, I will consider defendants' alternative argument that § 476 is invalid as applied here because Congress does not have the power to upset final judgments.

The Supreme Court has repeatedly held that litigants have vested rights in final judgments and that Congress has no power to take away those vested rights through later legislation.

> It is not within the power of a legislature to take away rights which have once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-24 (1898). *See also, Hodges v. Snyder,* 261 U.S. 600, 603 (1923); *United States v. O'Grady,* 89 U.S. 641, 647 (1875); *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. 421, 431 (1855). The Tenth Circuit indicated its approval of this rule in *Taxpayers for Animas-La Plata v. Animas-La Plata Water Conservancy District,* 739 F.2d 1472, 1477 (10th Cir. 1984), ("[T]he court has indicated that it would not allow a legislature to interfere with an adjudicated right").

Final judgment entered in this action on October 10, 1991, more than one month before Congress enacted § 476. Thus, because § 476 calls for the reinstatement of claims finally adjudicated, it is unconstitutional as applied here. Further, this result is proper even though plaintiffs' Rule 60(b) motion is still pending. A pending Rule 60(b) motion does not affect the finality of a judgment or suspend its operation. *Sutherland v. Fitzgerald,* 291 F.2d 846, 847 (10th Cir. 1961). Therefore, the motion to reinstate is denied.

As to the merits of plaintiffs' Rule 60(b) motion, their argument for setting aside final judgment rests on the assumption that § 476 is valid. However, in *Bank of Denver, supra,* I held

that § 476 is unconstitutional regardless of whether final judgment has entered in a specific case. Therefore, plaintiffs' 60(b) motion is denied.

Accordingly, IT IS ORDERED THAT:

(1) Plaintiffs' motion to reinstate is DENIED; and,

(2) Plaintiffs' Rule 60(b) motion is DENIED.

Dated in Denver, Colorado this 20th day of March, 1992.

BY THE COURT:

LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 90-B-177

CERTIFICATE OF MAILING

A copy of this Order was mailed to the following on March 20, 1992.

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Chief Magistrate Judge Abram

_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-177

LARRY D. JOHNSTON, LAWRENCE G. LYON, and H. RODGERS COMPANY, a Colorado general partnership,

Plaintiffs,

v.

CIGNA CORPORATION, a Delaware corporation, CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, a Delaware corporation, CIGNA SECURITIES, INC., a Delaware corporation, CIGNA FINANCIAL PARTNERS, INC., a Delaware corporation, CIGNA HOLDINGS, INC., a Delaware corporation, and M. DOAK JACOWAY,

Defendants.

MEMORANDUM OPINION AND ORDER

Babcock, J.

Plaintiffs' move for reconsideration under Fed. R. Civ. P. 59(e) of my March 20, 1992 memorandum opinion and order denying reinstatement of their claims under § 10(b)(5) of the Securities and Exchange Act of 1934. Plaintiffs contend that the intervening Supreme Court decision in *Robertson v. Seattle Audubon Society*, 60 USLW 4273 (March 25, 1992) compels a different result. Additionally, the United States and the Securities and Exchange Commission have now filed a statement of interest in support of the constitutionality of § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991. The issue is adequately briefed and oral argument will not materially aid its resolution. Because the Supreme Court's recent decision does not affect the force or conclusion of my prior order, the motion to reconsider is denied.

In accordance with *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ____ U.S. ____, 111 S.Ct. 2773 (1991), *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439 (1991), and *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420 (10th Cir. 1991), I granted defendants' motion for summary judgment on the ground that plaintiffs' § 10(b) and Rule 10b-5 claims were time barred. Final judgment entered in favor of defendants on October 10, 1991.

On November 27, 1991, Congress enacted § 476 of the FDIC Improvement Act of 1991. That provision attempted to reinstate actions that were pending before *Lampf* and then dismissed as time barred. Plaintiffs timely moved to reinstate their claims under § 476 and moved under Fed. R. Civ. P. 60(b) to set aside the final judgment in light of the new statute. Incorporating my detailed analysis in a companion case, *Bank of Denver v. Southeastern Capital Group, Inc.*, No. 90-B-1551, ____ F. Supp. ____ (D.Colo. 1992), I held that § 476 is unconstitutional on its face because it violates the principle of separation of powers. I also held that it is unconstitutional as applied because it upsets vested rights in a final judgment. Finally, I denied plaintiffs' Rule 60(b) motion because it was wholly premised on an unconstitutional statute.

Plaintiffs now move to reconsider my prior rulings in light of the Supreme Court's decision in *Seattle Audubon, supra.* A Fed. R. Civ. P. 59(e) motion to alter or amend judgment may properly be cast in the form of a motion to reconsider. *St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). There are three major grounds that justify reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D.Colo. 1988). Moreover, "a motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' " and make legal arguments that could have been raised before. *Id.* Because I perceive no clear error in my prior order and plaintiffs point out none, my review

here will be limited to the effect, if any, the Court's decision in *Seattle Audubon* has on the constitutionality of § 476.

In *Seattle Audubon,* the Court reversed the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson,* 914 F.2d 1311 (9th Cir. 1990). The Ninth Circuit held that a new environmental statute which specifically referenced pending cases prescribed a rule of decision within the meaning of *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871), because it had not changed or amended the underlying laws. The new statute provided that management of certain lands in conformity with new standards set out in the statute would be deemed to constitute compliance with the requirements of existing environmental and land management statutes.

The Court reversed the Ninth Circuit because it felt that the new statute had changed the law by creating a new set of standards that, if met, would constitute compliance with the then existing statutory requirements. "[The new statute's] operation, we think, modified the old provisions. Moreover, we find nothing in subsection (b)(6)(A) that purported to direct any particular findings of fact or applications of law, old or new, to fact." *Seattle Audubon, slip op.* at 8. The Court emphasized that it had no occasion to reach any broad question of Article III jurisprudence or the propriety of the Ninth Circuit's formulation of the principles set out in *Klein. Id.* at 11.

I conclude that the Court's opinion in *Seattle Audubon* does nothing to upset my prior rulings in this case and *Bank of Denver.* First, the statute at issue in *Seattle Audubon* is entirely different from the statute at issue here. In *Seattle Audubon,* Congress enacted a statute which essentially provided that compliance with the new provisions would constitute compliance with several other previously existing statutes. In effect, Congress rewrote its own statutory framework. In stark contrast, § 476 attempts to overturn a decision of the Supreme Court interpreting the unchanged language of § 10(b). Significantly, the statute at issue in *Klein* also attempted to overturn a judicial interpretation of an unchanged law. *Klein,* 80 U.S. at 145 and 147, ("[The

statute's] great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have" and "The court is forbidden to give effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely the contrary").

The Court suggested that a statute cannot compel "results under old law" or "direct any particular . . . application of law, old or new, to fact." *Seattle Audubon, slip op.* at 8. The statute here does precisely that. It compels a result under the unchanged provisions of § 10(b) — namely, it directs federal courts in a discrete body of pending cases to ignore the Supreme Court's binding interpretation of § 10(b) and to reinstate actions that were dismissed under the Court's interpretation. Thus, the *Seattle Audubon* decision does not compel me to change my conclusion that § 476 did not change the law.

Second, in *Seattle Audubon,* Congress enacted a statute with general, prospective application, effecting a comprehensive set of rules to govern timber harvesting within a geographically and temporally limited domain. *Seattle Audubon, slip op.* at 3-4. Although that statute referred to two pending cases by name, it did so only to identify the five federal statutes that were being effectively amended. *Id.* at 10. Here, § 476 has no prospective application at all, nor does it have uniform retroactive application. Rather, it selects a limited body of pending federal cases for resurrection from the death knell sounded by *Lampf.* Thus, it is clear that Congress' great and controlling purpose was not to change the law but to overturn a Supreme Court decision with which it did not agree.

Third, my opinion in *Bank of Denver* did not rely on the Ninth Circuit's ultimate conclusion that the statute at issue there did not change the existing law. Rather, I used the Ninth Circuit's opinion as a convenient expression of the principles set out in *Klein*. Because the Supreme Court did not address the Ninth Circuit's formulation of the proper inquiry under *Klein*, but reversed only the Ninth Circuit's application of its own test, that decision has no impact on my prior ruling.

Lastly, my conclusion that § 476 violates settled separation of powers principles was not based wholly on the particular rule expressed in *Klein*. I also held that, under general separation of powers principles, § 476 constitutes an encroachment on the quintessential constitutional attribute of the judiciary — the power to interpret the laws. This conclusion was in no way dependent on the Ninth Circuit's opinion or, for that matter, the particular expression of these general principles in *Klein*. Therefore, I must again conclude that *Seattle Audubon* does not affect my prior ruling.

Accordingly, IT IS ORDERED THAT:

(1) Plaintiffs' motion for reconsideration is DENIED.

Dated in Denver, Colorado this 20th day of May, 1992.

BY THE COURT:

LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 90-B-177

CERTIFICATE OF MAILING

A copy of this Order was mailed to the following on May 21, 1992.

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Chief Magistrate Judge Abram

_____

Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-0177

LARRY D. JOHNSTON, LAWRENCE G. LYON and H. RODGERS COMPANY, a Colorado general partnership,

Plaintiffs,

v.

CIGNA CORPORATION, a Delaware corporation, CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, a Delaware corporation, CIGNA SECURITIES, INC., a Delaware corporation, CIGNA FINANCIAL PARTNERS, INC., a Delaware corporation, CIGNA HOLDINGS, INC., a Delaware corporation, and M. DOAK JACOWAY,

Defendants.

MEMORANDUM OPINION AND ORDER

Babcock, J.

CIGNA Corporation, CIGNA Individual Financial Services Company, CIGNA Securities, Inc., CIGNA Financial Partners, Inc., CIGNA Holdings, Inc., and M. Doak Jacoway (collectively CIGNA) move to dismiss the claims of Larry D. Johnston, Lawrence G. Lyon and H. Rodgers Company (investors). The investors allege that, in selling certain securities in 1983 and in 1987, CIGNA violated section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 (the 10b claim), and various Colorado state securities laws and common law duties. CIGNA moves to dismiss the 10b claim contending the statute of limitation has run on the 1983 transactions and the complaint fails to state a federal claim on the 1987 transactions. CIGNA also seeks dismissal of the pendent state claims.

Because I conclude that the statute of repose of the Colorado statute most analogous to section 10b does not apply and

that, in any event, the applicable statute of limitation invokes new common law that should not be applied retroactively, I deny CIGNA's motion to dismiss the 10b claim as to the 1983 transactions. Because the complaint is not defective as CIGNA argues, I deny the motion to dismiss the 10b claim as to the 1987 transactions. Finally, I decline to exercise jurisdiction over the pendent state claims and grant CIGNA's motion to dismiss without prejudice those claims.

The investors allege that in 1983 and 1987, CIGNA recommended, offered, and sold to them limited partnership interests in four separate real estate limited partnerships. Two of the transactions were in 1983: (1) four interests in the Nashville House Office Center Associates Limited Partnership, and (2) three interests in the Springs of Country Woods Apartment Associates Limited Partnership. Two of the transactions were in 1987: (1) one unit in the CIGNA Hotel Associates-I Limited Partnership, and (2) one unit in the Regional Mall Development Partners, L.P.

In count one of their complaint, the investors allege that CIGNA violated section 10b of the Securities Exchange Act of 1934, 15 U.S.C. 78j, and Rule 10b-5 promulgated thereunder, in recommending, offering and selling the interests. In counts two through four, the investors allege that CIGNA violated various Colorado state securities statutes and common law duties in the sale of the securities.

Dismissal under Rule 12(b)(6) is proper when it is evident from the plaintiff's complaint that the defendant is not liable to the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Conley v. Gibson,* 355 U.S. 41 (1957). When ruling on a motion to dismiss, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer,* 416 U.S. at 236.

I. COUNT ONE: SECTION 10b CLAIM

A. Statute of Limitation: The 1983 Transactions

CIGNA first argues that the 10b claim relating to the 1983 transactions in count one should be dismissed because the statute of limitation has run.

Congress has not established a statute of limitation period for section 10b and Rule 10b-5 actions. Hence, I look to other sources for the time limit. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 146-47 (1987); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 818-19 (10th Cir. 1990); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 691 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Punahele v. United Air Lines, Inc.*, 743 F. Supp. 758, 759-60 (D. Colo. 1990). Generally, when Congress creates a cause of action without specifying the applicable statute of limitation, courts apply the statutory period found in the forum state law most analogous to the federal cause of action. *Reed v. United Transp. Union*, 488 U.S. 319 (1989). Courts will "decline to borrow a state statute of limitations only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.' " *Reed*, 488 U.S. at 324 (quoting *DelCostello v. Teamster*, 462 U.S. 151, 172 (1983)). No party contends that there are reasons weighing against applying a Colorado statute of limitation here. Consequently, I look to Colorado law to find the appropriate limitation period.

The parties agree that the Colorado Securities Act of 1981, Colo. Rev. Stat. § 11-51-123(1), is most analogous to federal section 10b. *See State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402, 405 (D. Colo. 1979), *aff'd on other grounds*, 651 F.2d 687, 691 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). Until 1981, however, Colorado provided no statute of limitation for that section. Instead, Colorado courts applied the three-year limit of Colo. Rev. Stat. § 13-80-109 (1973), the statute of limitation for fraud actions. Consequently, federal courts,

looking for the Colorado statute of limitation period of the statute most analogous to federal section 10b, have applied Colo. Rev. Stat. § 13-80-109. *See, e.g., Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. at 406.

In 1981, however, Colorado adopted a statute of limitation for bringing an action under Colo. Rev. Stat. § 11-51-123, the Colorado counterpart to federal 10b. That section provides that no person may bring such an action more than three years after the facts giving rise to such a cause of action are discovered by the exercise of reasonable diligence. Colo. Rev. Stat. § 11-51-125(8). The statute also contains a statute of repose which provides that in no event may a party bring a claim more than five years after the purchase or sale of the securities. Colo. Rev. Stat. § 11-51-125(8). In their pleadings, the investors concede that if this section applies here, their claim founded on the 1983 sales would be time barred. The investors argue, however, that even if Colo. Rev. Stat. § 11-51-125(8) does apply to 10b actions, it should not bar their claim in this case because (1) I should adopt only the limitations period and not the statute of repose and (2) application here would constitute an unjust retroactive application of a new principle of law.

I agree with the investors that federal equitable tolling rules apply here, and decline to adopt the state statute of repose. I also agree with the investors that, even if I were to adopt the statute of repose along with the statute of limitations, I should not apply Colo. Rev. Stat § 11-51-125(8) retroactively.

1. Statute of Repose and Federal Equitable Tolling Rules

As CIGNA concedes, principles of equitable tolling are a matter of federal law. *Peterson*, 651 F.2d at 691. CIGNA argues, however, that when the state statute most analogous to 10b contains a statute of repose, federal courts must adopt the entire scheme, not merely the limitations period. This is an issue on which courts have disagreed. *Compare Gurley v. Documation Inc.*, 674 F.2d 253, 259 (4th Cir. 1982); *United California Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir.), *cert. denied*, 414 U.S. 1004

(1973); *Pucci v. Santi*, 711 F. Supp. 916, 928 (N.D. Ill. 1989); *Geeting v. Prizant*, 664 F. Supp. 343, 348-50 (N.D. Ill. 1987); *Estate of Dearing v. Dearing*, 646 F. Supp. 903, 908 (S.D.W. Va. 1986); *Bull v. American Bank & Trust Co.*, 641 F. Supp. 62, 67-69 (E.D. Pa. 1986); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 239-40 (E.D. Pa. 1983) *with Reshal Assoc., Inc v. Long Grove Trading Co.*, No 90-C-2591 (N.D. Ill. December 17, 1990) (LEXIS, Genfed library, Dist file); *Morley v. Cohen*, 610 F. Supp. 798, 818-21 & n.20 (D. Md. 1985); *Vosbikian v. Wasserstrom*, Fed. Sec. L. Rep. (CCH) [1986-87 Transfer Binder] ¶ 92,709 (E.D. Pa. Dec. 12, 1989); *Sowell v. Butcher & Singer, Inc.*, No. 84-0714 (E.D. Pa. May 13, 1987) (LEXIS Genfed library, Dist file). Even the Supreme Court has given conflicting signals on this issue. *Compare Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) *with Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-65 (1975).

Essentially, this question involves the selection of two potentially competing judicially-created doctrines used when Congress is silent as to the applicable statute of limitations. One doctrine requires the federal courts to apply the statute of limitations in the state statute most analogous to the federal statute. The second doctrine requires invocation of federal equitable tolling rules. I conclude here that the two doctrines are not mutually exclusive. The first requires only that I look to state law for the most analogous statute of limitations period, not for a statute of repose; the second requires that I apply federal equitable tolling. *See Geeting*, 664 F. Supp. at 350.

CIGNA argues that I should follow the rule set forth in *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980): "[w]here the statute expressly provides for a tolling period for fraudulent concealment, and then includes a secondary date which 'in no event' can be surmounted, there is good basis for the belief that the latter date was intended as an absolute barrier to the filing of suits." 627 F.2d at 1043 (quoting *Timmreck v. Munn*, 433 F. Supp. 396, 408 (N.D. Ill. 1977). The Tenth Circuit in *Aldrich*, however, was concerned with a federal statute, not an adopted state statute of limitations. It is axiomatic that when

applying an express federal statute of limitations, federal courts should not employ the judicially-created equitable tolling doctrine to the exclusion of the express provisions of the statute.

This reasoning, however, does not mandate that when federal courts adopt a state statute of limitations they must also adopt the state statute of repose and nullify federal equitable tolling rules. It certainly does not counter the language in *Peterson* that "[t]he rule in this circuit has been that in fraud cases only the limitations *period* is borrowed from state law, whereas the tolling rule is supplied by federal jurisprudence." 651 F.2d at 691 (emphasis in original).

CIGNA next argues that to adopt the statute of limitations but not the statute of repose drains the state statute of meaning. I disagree. First, there exists no requirement that a federal court adopt a state statute of repose in addition to a state statute of limitations. Second, here I do adopt the state statute of limitations and decline to embrace only the statute of repose. Third, by adopting only the limitation period of Colo. Rev. Stat. § 11-51-125(8), there is no discernable damage inflicted on the statutory scheme. Finally, "as between the state's interest in repose and federal concerns in addressing securities fraud, the later must prevail since it is a federal cause of action brought in federal court which is at issue." *Geeting,* 664 F. Supp. at 350.

2. Retroactivity

The investors argue further that, even if I did adopt the statute of limitations and the statute of repose found in Colo. Rev. Stat. § 11-51-125(8), I should not apply that section retroactively. I agree.

In *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1941), the Supreme Court looked to three factors in determining the propriety of retroactive application of new common law: (1) whether the decision to be applied retroactively establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied [citations omitted], or by deciding an

issue of first impression whose resolution was not clearly foreshadowed [citations omitted];" (2) whether retroactive operation of the rule will further or retard the purpose and effect of the rule; and (3) whether retroactive application of a new rule will "produce substantial inequitable results." *Chevron*, 404 U.S. at 106-07.

CIGNA argues that the addition in 1981 of a limitation period specifically for actions under Colo. Rev. Stat. § 11-51-123 was statutory, and thus, its application here involves no new common law rule. Consequently, CIGNA contends the rule of *Chevron*, is inapplicable in this case. I disagree because although the addition of Colo. Rev. Stat. § 11-51-125(8) was statutory, the *decision* to adopt *that* limitation period for federal 10b actions is common-law based. I therefore apply the *Chevron* analysis here.

First, it has been so long held that the statute of limitation for fraud actions applied to suits brought under Colo. Rev. Stat. § 11-51-123, that application of the fraud limitation period to 10b actions has taken deep root in the District of Colorado. Some courts applied the fraud limitation period to 10b actions without explicit recognition that it was closely related to Colo. Rev. Stat. § 11-51-123. *See, e.g., Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516, 520 & n. 4 (10th Cir. 1988); *Aldrich*, 627 F.2d at 1041; *Schneider v. Boettcher & Co.*, No. 88-C-1999, slip op. at 6 (D. Colo. Dec. 27, 1990); *Resource Exploration & Mining, Inc. v. Intel Corp.*, 492 F. Supp. 515, 516 (D. Colo. 1980). As a result, even after the new limitation period for Colo. Rev. Stat. § 11-51-123 was adopted by the Colorado General Assembly, courts continued to apply the fraud limitation period without reference to the more specific limitation provisions of Colo. Rev. Stat. § 11-51-125(8). *See, e.g., Hackbart v. Holmes*, 675 F.2d 1114, 1120 (10th Cir. 1982); *Dubin v. Miller*, 132 F.R.D. 269, 275 (D. Colo. 1990); *Morgan v. Bosworth*, 545 F. Supp. 953, 955 (D. Colo. 1982). In these circumstances, I conclude that my decision to apply Colo. Rev. Stat. § 11-51-125(8) to 10b actions is a "new principle of law" under *Chevron*.

Next, the second *Chevron* factor is neutral in its application. Finally, the last *Chevron* consideration is intimately linked to the first. I conclude that the harsh result of dismissing the investors' 10b claim on the 1983 transactions is unjust under the precedent on this issue. Retroactive application of an altered statute of limitation is especially suspect. *See Jones v. Consolidated Freightways Corp.*, 776 F.2d 1458 (10th Cir 1985); *Jackson v. City of Broomfield*, 731 F.2d 652, 654-55 (10th Cir. 1984). Consequently, I will not apply Colo. Rev. Stat. § 11-51-125(8) retroactively here.

B. Inadequate Pleading: The 1987 Transactions

CIGNA next argues that I should dismiss the 10b claim relating to the 1987 transactions because the investors fail to allege: (1) any loss incurred in connection with the 1987 investments; (2) any misrepresentations in connection with the 1987 investments; and (3) a causal connection between any loss of value and the alleged misrepresentations. I disagree.

First, the complaint is sufficiently explicit in alleging losses in the 1987 investment. Complaint ¶ 25. Second, the complaint alleges two representations which were false: (1) CIGNA promised to stand behind the investments and provide the funding necessary to preserve the investments, Complaint ¶¶ 19, 23; and (2) CIGNA recommended the investments as suitable for the investors in type and amount, Complaint ¶ 22, 27(a). Contrary to CIGNA's assertion, the investors have alleged misrepresentations. Finally, the complaint, fairly read, is sufficient to allege a causal connection between the alleged losses and misrepresentations.

In their reply, CIGNA argues that recommendation of unsuitable securities does not violate 10b. Neither party has briefed the issue adequately. Consequently, I leave that issue for a later day.

II. PENDENT STATE CLAIMS

CIGNA has moved to dismiss the investors' second, third and fourth claims for relief. Those claims allege violations of state securities law and common law fraud. The decision whether

to accept jurisdiction of a state claim lies within the sound discretion of the trial court. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). I decline to exercise pendent jurisdiction over related state claims in cases arising under the federal securities laws. *See Miller v. Calvin,* 647 F. Supp. 199, 203 (D. Colo. 1985).

Accordingly, it is ORDERED THAT

(1) CIGNA's motion to dismiss Count 1 is DENIED;

(2) CIGNA's motion to dismiss Counts 2 through 4 is GRANTED. Those claims are DISMISSED without prejudice;

(3) Each party is to bear it own costs.

Dated in Denver, Colorado this 9th day of January, 1991.

BY THE COURT:

LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 90-B-177

CERTIFICATE OF MAILING

A copy of this Order was mailed to the following on January 9, 1991.

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